IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.252 OF 1992

Sukhdeo Rangnath Jadhavkar
res. at Chumb,
Taluka Barshi,
District: Solapur ..Appellant
(Original Defd.No.1)

versus

1. Bhujanga Dadgu Jadhavar

2. Raosaheb Dagdu Jadhavar

3. Kadubai Dagdu Jadhavar

4. Maruti Dagdu Jadhavar

Nos.1 to 4 residing at Chumb,
Tal: Barshi,
Dist: Solapur.

5. Kantabai Govardhan Dhakane,
Res. at Chumb,
Tal: Barshi,
Dist: Solapur.

6. Kantibai Soma Dhakane,
res. at Koregaon,
Tal: Barshi,
Dist: Solapur ..Respondents
(Nos.1, 2 and 4
Org. Planitiffs
Nos.3,5 & 6 Org.
Defd. Nos.2, 3 & 4)

Mr.P.N.Karlekar for the Appellant
Mr. K.Y.Mandlik for the Respondents

Coram : S.R.Sathe, J.
Dated : 30th June, 2006

JUDGMENT.

1. Appellant, the Original Defendant No.1 in

Regular Civil Suit No.133 of 1981 has preferred this appeal against the judgment and order passed by the Court of Second Additional District Judge, Solapur whereby the order passed by the trial Court dismissing the plaintiffs suit for possession of the encroached land was set aside and appeal was allowed and defendant Nos.1 to 3 were directed to deliver possession of the suit land to plaintiff and to pay Rs.600/- towards mesne profits. For the sake of convenience, hereafter the parties shall be referred to as plaintiffs and defendants.

2. Brief facts giving rise to this appeal are as under :

. The suit land bearing survey No.182 situated at village Chumb, Taluka Barshi is owned by the plaintiffs. To the east of the plaintiffs land there is land bearing survey No.181 which is owned by the defendant No.1. The defendant No.1 filed regular civil suit No.433 of 1970 against the present plaintiffs alleging that the present plaintiffs have made an encroachment in his land bearing survey No.181 and on the basis of the said allegation and the measurement map No.2858 the

defendant No.1 claimed possession of the encroached portion from the present plaintiffs. As, according to the present plaintiffs the said map on the basis of which the defendant No.1 had claimed possession was not correctly drawn, he asked for appointment of Commissioner and remeasurement (Nimtana) of the land. Accordingly, the Civil Court, Barshi was pleased to appoint Commissioner for Nimtana of the land. The Commissioner measured the land on 26.4.1973 and submitted the report. As per the said measurement it was shown that the present Defendant No.1 has made an encroachment in the present plaintiffs land to the extent of 36 Ares. It is on the basis of this map and encroachment the plaintiffs filed the present suit bearing No.133 of 1981 in the Court of CJJD, Barshi and claimed possession of the encroached land from the defendant No.1. The plaintiff submitted that the defendant Nos.2 and 3 are the co-sharers in the plaintiffs land and as they were not available to sign the plaint, they were impleaded as defendant Nos.2 and 3.

3. The defendant No.1 filed the written statement at Exhibit 13 and admitted that the land

bearing survey No.182 is owned by the plaintiffs and to the east of the said land there is land bearing survey No.181 which is owned by him. The defendant No.1 further contended that the Bunding Department has put the bund in between the plaintiffs land and his land and the portion on the eastern as well as the western side of the said bund and Tal is lying vacant for years together and neither the plaintiff nor the defendant No.1 were in possession of the same. The defendant also submitted that there was no cause of action for the plaintiff to file the present suit and the plaintiff is not entitled to claim possession of the land as alleged. He also contended that the suit is barred by law of limitation. Hence, on all these grounds the defendant No.1 prayed for dismissal of the suit.

4. On these pleadings the learned trial judge framed issues at Exhibit 14. In order to prove the suit claim the Plaintiff No.1 Bhujang Jadhavar examined himself at Exhibit 83 and Cadestral Surveyor Sharad Kamat at Exhibit 84. He also produced the map drawn by the Cadestral Surveyor on 26.4.1973. As against this the defendant No.1 examined himself at Exhibit 93.

5. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that the plaintiff has based his claim on the measurement map which is called as "C" Sheet. However, it is not the original map and as such plaintiffs have failed to prove that they are entitled to adduce secondary evidence. The map in question, namely "C" Sheet cannot be read in evidence. He, therefore, held that the alleged encroachment is not proved by the plaintiff. He, therefore dismissed the plaintiffs suit.

6. Being aggrieved by the said order the plaintiffs filed Regular Civil Appeal No.182 of 1989 in the Court of Second Addl. District Judge, Solapur. After hearing the arguments advanced by both the learned Advocates, the learned Second Additional District Judge, Solapur came to the conclusion that as the original map was lost, plaintiff was entitled to file copy of the same, namely "C" Sheet and the same is admissible in evidence. Relying on the said map the learned Second Additional District Judge held that the plaintiff has proved that the defendant No.1 has

made an encroachment to the extent of 36 Acres. He, therefore, set aside the order passed by the learned trial Judge and decreed the suit in plaintiffs favour.

7. The above mentioned order passed by the learned Second Additional District Judge is challenged in the present second appeal.

8. From the perusal of the record it appears that while admitting the appeal, this Court (Coram A.V.Sawant) has passed the following order:

> " Admit on grounds (B) to (D) as substantial question of law."

. The said substantial questions of law are as under:

> B) It should have been held that the document relied upon by the Plaintiff in support of the claim being a copy of the survey map, was not admissible in evidence.
>
> C) The Appeal Court erred in law to allow the copy of the map, sheet "C" to be admitted into evidence as Exhibit 14 and to find on the basis of the said document that the plaintiff proved the alleged

encroachment.

D) The map drawn by the Surveyor at the instance of the parties in the previous suit was not a public document and no secondary evidence being a certified copy of the original map was at all admissible.

8. In this appeal before me, Shri Karlekar, learned Advocate for the appellant (original defendant No.1) has urged only two points. Firstly, he submitted that the learned trial Court has not properly appreciated the evidence on record and has wrongly held that under the circumstances of the case plaintiff was entitled to lead secondary evidence. Secondly, he canvassed before me that the learned First Appellate Judge wrongly held that the primary evidence namely "A" Sheet of the map in question was not available and as such plaintiff was entitled to lead secondary evidence. He submitted that the learned First Appellate Judge wrongly admitted "C" Sheet in evidence and has relied thereupon. He, therefore, submitted that the plaintiff has infact failed to prove the alleged encroachment and the suit be dismissed.

9. As against this, Shri Mandlik, learned Advocate for the plaintiff supported the judgment

and order passed by the First Appellate Judge. It is not in dispute that the plaintiffs are owners of the land bearing survey No.182 while the defendant No.1 is the owner of the land bearing Survey No.181 and the same is situated to the east of the plaintiffs land. It is also an admitted fact that the present defendant No.1 (Appellant) had filed Regular Civil Suit No.430 of 1970 against the present plaintiffs wherein he had alleged that the present plaintiffs had made the encroachment in his land. Admittedly, in that suit the present plaintiffs had made an application for appointment of Commissioner and for remeasurement of the land and accordingly the Court was pleased to appoint the Commissioner and then the Cadestral Surveyor acting as Commissioner remeasured the land or in other words carried out Nimtana and in that Nimtana it was found that on particular portion the present plaintiff had made an encroachment to the extent of 11 Ares while on the other side the present defendant No.1 had made an encroachment of 36 Ares in plaintiff's land. The portion where the present plaintiff had made an encroachment is not at all the subject matter of the present suit, but the subject matter of the present suit is 36 Ares portion i.e.

the portion encroached by the present defendant No.1 in plaintiff’s land bearing Survey No.182.

10. In order to prove his claim, the plaintiff No.1 has examined himself at Exhibit 83 and has stated that the defendant No.1 has made an encroachment in his land as shown in the map drawn by the Cadestral Surveyor Sharad Kamat on 26.4.1973. Infact, plaintiffs witness Sharad Kamat has also stated accordingly. He has categorically stated that as per the court order he carried out the measurement of the land in question and it was noticed that the present defendant No.1 had made encroachment to the extent of 36 Ares in the plaintiffs land. He has further stated that the original map which was known as "A" Sheet was produced in the DILR officer, so also he has drawn copy of the said map which was also produced and it was certified as "C" sheet. It is pertinent to note that the defendant has nowhere contended that the Cadestral Surveyor Sharad Kamat had not visited the suit land or that the map in question namely Register No.2384 is not drawn by the Cadestral Surveyor Sharad Kamat. What is more to be noted is that it is not even suggested to the said witneses

that the said map drawn by him is not correct or that the same is not drawn by following the necessary procedure contemplated under the Act and rules.

11. The only submission made by for the learned Advocate for the defendant No.1 is that the said map "C" sheet cannot be admitted in evidence because it is a copy of "A" Sheet and thus not the original. It is needless to say that as per the provisions of Section 61 of the Indian Evidence Act, 1872 the contents of documents may be proved either by primary or secondary evidence. In the instant case the original map "A" Sheet was the primary evidence. However, the plaintiff has not produced the same and he has adduced secondary evidence i.e. "C" Sheet. As per the provision of Section 63 of the Evidence Act, copies made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies as well as certified copies and copies made from or compared with the original are to be treated as secondary evidence.

12. The question arises whether the secondary

evidence that is adduced by the plaintiffs in this case is admissible or not. For that purpose one has to see as to under what circumstances party can adduce secondary evidence. Having regard to the provisions of Section 65 of the Indian Evidence Act, it is very clear that when notice is given to the person who is in possession of the original document and even then the said document is not produced or cannot be procured then in such circumstances the secondary evidence can be adduced. Similarly, when it is shown that original is destroyed or lost, then also, secondary evidence can be adduced. In the instant case, the Cadestral Surveyor has specifically stated that even "C" sheet is prepared by him and it was also handed over to DILR office. It is pertinent to note that this "C" sheet was in fact produced in the earlier suit bearing No.430 of 1970 and the same has been produced on record with list Exhibit 75 by the present plaintiff after summoning the concerned clerk working in the record office of District Court, Solapur. Not only that, but certified copy of "C" Sheet is also produced by the plaintiff alongwith the plaint. Moreover, when DILR was called to produce "A" Sheet he has reported that the same is not available in his office. If we

see "C" Sheet it bears the endorsement of DILR that it is a certified copy of "A" Sheet. So, it is very clear that even "C" Sheet is duly verified by the office of DILR and the same was also relied upon by the parties in the earlier suit. So, having regard to these peculiar facts and circumstances, I have no hesitation to hold that the plaintiff had made all the necessary efforts to get original "A" Sheet produced. However, as the said "A" Sheet was not traced and available, the plaintiffs relied on "C" Sheet". It is also duly certified by the DILR. So, the said "C" Sheet has been rightly admitted in evidence by the First Appellate Judge. Here, one must also note that this "C" Sheet is also prepared by plaintiffs witness Sharad Kamat- Exhibit 84 and he has also deposed that the contents of the same are correct. Thus, when the author of the said map is also saying that the contents of the said map are correct and the same are also prepared as per "A" Sheet, there is no reason to hold that the contents of the said "C" Sheet are not duly proved. Thus, once it is said that the said "C" Sheet was duly proved then it must be held that the defendant No.1. has made an encroachment to the extent of 36 Ares in plaintiffs land bearing Survey No.182, as shown in

the said "C" Sheet. The finding recorded by the First Appellate Court in this behalf is unassailable.

13. The learned Advocate for the defendant No.1 tried to argue before me that there has been inordinate delay in filing the suit from the date when the alleged encroachment was noticed. It is true that there is delay, but at the same time it is very clear that the present suit is for the possession of encroached portion and it is based on title and as such well within limitation. So, merely because there is delay in filing the suit, one cannot deny plaintiffs claim particularly when he has proved the alleged encroachment. A feeble attempt was made to show that there may be some changes in the property during these years. However, merely vague suggestion in that behalf is of no use. It is very clear that when the Cadestral Surveyor Sharad Kamat measured the land and prepared map from Nimtana, the demarcating lines of the plaintiff’s land and defendant’s land were available and on that basis he prepared the map. So, when defendant No.1. has not adduced any specific evidence to show that encroached portion shown in

the said map is now not in his possession or that it is with plaintiff's, there is no need to reject plaintiffs claim merely by assuming that during these years some change must have taken place in the position of the land.

14. In view of the above, it is very clear that the first Appellate Judge, has rightly held that the plaintiffs have proved that the defendant No.1 has made an encroachment as alleged. Further, it appears that while passing decree he has observed that defendant Nos.1 to 3 to deliver the possession. In fact, even in the plaint the plaintiff has claimed that the defendant No.1 has made an encroachment and defendant Nos.2 to 4 are the co-sharers of the land bearing Survey No.182 and as they were not available to sign the plaint they were impleaded as defendants. It is therefore necessary to pass decree only against defendant No.1.

15. In this view of the matter, the appeal is dismissed, with slight modification in the order passed by the Second Additional District Judge, Solapur and it is hereby directed that instead of defendants 1 to 3, defendant No.1 to deliver the

possession of the land admeasuring 36 ares described in para 1(b) of the plaint and shown in yellow colour in the "C" Sheet Exhibit 14 to the plaintiff and to pay Rs.600/- as mesne profit.

. The defendant no.1 to pay plaintiff the costs of this appeal and bear his own.

(S.R.Sathe, J.)